A

Wong Koon Seng v Rahman Hydraulic Tin Bhd & Ors

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-04–152 OF 2002
ZALEHA ZAHARI, SULONG MATJERAIE AND T SELVENTHIRANATHAN JJCA
3 JUNE 2010

C

Civil Procedure — Appeal — Leave of appeal — Appellant seeking reinstatement of appeal — Appellant's solicitors failed to give reasons for reinstatement of appeal — Appellant failed to attend hearing relying on notice of change of solicitors filed one day before hearing date — Whether court has discretion to strike out appellant's application

D

The Court of Appeal vide notice dated 1 September 2009 informed the appellant and the respondents of an appeal application, encl (22a) to reinstate Appeal No W-04–152 of 2002 'the CA' would be heard on 20 October 2009 at 9am 'the hearing date'. Later, the respondents' solicitors were informed by the

E

appellant's solicitors that the appellant wished to withdraw the CA on the hearing date. Subsequently, the appellant's solicitors proposed that no order as to costs be made and the deposit be refunded to the appellant to which the respondents' solicitors agreed. However, the appellant's solicitors by encl (20a),

F

applied to discharge themselves as the appellant's solicitors, filed a notice of change of solicitors and wrote to inform the appellant a day before the hearing date. On the hearing date the respondents' solicitors successfully applied to strike out the CA in the absence of the appellant's solicitors. The appellant's solicitors submitted they did not attend the hearing date due to

G

misunderstanding as to the correct time of the hearing date and argued that the respondents' solicitors should not have applied to strike out the appellant's appeal as the respondents noticed the appellant's change of mind to proceed with the CA.

H

Held, dismissing encl (22a) with no order as to costs and striking out encl (20a):

(1) Whether a case is to be adjourned or not, is not upon agreement of parties but at the discretion of the court. The appellant's solicitors were clearly under serious misapprehension to expect the hearing of the appeal to be

I

adjourned as a matter of course by court by reason of having issued the letter which they did to the court a day to the hearing date. By reason of the appellant's solicitors absence when the appeal was called up for hearing, and no adjournment having been granted pursuant to the appellant's solicitors application to discharge themselves, the court had

the discretion on the application of the respondents' counsel to strike out the appeal on 20 August 2009 (see paras 10–11).

(2) Failure of the appellant's solicitors to furnish credible reasons for this court to exercise its discretion of reinstatement in the appellant's favour, encl (22a) was dismissed with no order as to costs. By reason of the application for reinstatement of the appeal having been dismissed, the appellant's solicitors' application to discharge themselves as the appellant's solicitors in encl (20a) was rendered academic and redundant and was accordingly struck out (see para 12).

[Bahasa Malaysia summary

Mahkamah Rayuan melalui notis bertarikh 1 September 2009 memberitahu perayu dan responden-responden mengenai permohonan rayuan, lampiran (22a) untuk menghidupkan semula Rayuan No W-04–152 Tahun 2002 'MR tersebut' akan didengar pada 20 Oktober 2009 pada 9 pagi 'tarikh perbicaraan'. Kemudiannya peguam responden-responden diberitahu oleh peguam perayu bahawa perayu berniat untuk menarik balik MR tersebut pada tarikh pendengaran. Peguam perayu kemudiannya mencadangkan bahawa tiada perintah kepada kos dibuat dan deposit dikembalikan kepada perayu di mana dipersetujui oleh peguam responden. Walau bagaimanapun peguam perayu melalui lampiran (20a), memohon untuk melepaskan mereka sebagai peguam perayu, memfailkan notis pertukaran peguam dan menulis untuk memberitahu perayu sehari sebelum tarikh pendengaran. Pada tarikh pendengaran, peguam responden berjaya memohon untuk membatalkan MR tersebut dalam ketiadaan peguam perayu. Peguam perayu berhujah bahawa mereka tidak hadir pada tarikh pendengaran akibat salah faham terhadap masa betul tarikh pendengaran dan berhujah bahawa peguam responden tidak patut memohon untuk membatalkan rayuan perayu memandangkan responden mengetahui bahawa perayu telah ubah fikiran untuk meneruskan dengan MR tersebut.

Diputuskan, menolak rayuan:

(1) Sama ada kes akan ditangguhkan atau tidak adalah bukan atas perjanjian pihak-pihak tetapi pada budi bicara mahkamah. Peguam perayu jelas di bawah salah faham yang serius untuk menjangka pendengaran rayuan akan ditangguhkan sebagai lazim dibuat oleh mahkamah atas alasan menyerahkan surat tersebut yang mana mereka serahkan kepada mahkamah sehari sebelum tarikh pendengaran. Atas alasan ketidakhadiran peguam perayu apabila rayuan dipanggil untuk pendengaran, dan tiada penangguhan telah diberikan berikutan permohonan peguam perayu untuk melepaskan diri mereka, mahkamah mempunyai budi bicara atas permohonan peguam responden untuk membatalkan rayuan pada 20 Ogos 2009 (lihat perenggan 10–11).

(2) Kegagalan peguam perayu untuk mengemukakan alasan-alasan yang boleh dipercayai untuk mahkamah ini menjalankan budi bicaranya tentang menghidupkan kembali rayuan memihak perayu, lampiran (22a) ditolak tanpa perintah kepada kos. Atas alasan permohonan untuk menghidupkan kembali rayuan telah ditolak, permohonan peguam perayu untuk melepaskan diri mereka sebagai peguam perayu dalam lampiran (20a) adalah membuatkannya akademik dan tidak diperlukan dan oleh itu dibatalkan (lihat perenggan 12).]

Notes

For cases on leave to appeal, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1225–1287.

Appeal from: Application for Judicial Review No R2–25–90 of 2002 (High Court, Kuala Lumpur)

Basil Anthony (Kumar Jaspal Quah & Aishah) for the appellant.
Lau Kee Sern (Shook Lin & Bok) for the respondents.

Zaleha Zahari JCA (delivering judgment of the court):

[1] On 13 October 2010 we dismissed encl (22a), an application by the appellant's solicitors to reinstate appeal No W-04–152 of 2002 which had been struck out by the Court of Appeal on 20 October 2009 with no order as to costs. Thereafter, encl (20a), the application by the appellant's solicitors to discharge themselves as the appellant's solicitors, was then struck out. Our reasons for doing so are as follows.

[2] By consent of parties encl (22a) was heard first.

[3] The appeal in issue was against the decision of the High Court Judge Kuala Lumpur dated 28 October 2002. Vide notice dated 1 September 2009, the Court of Appeal registry issued a notice to all parties that this appeal was fixed for hearing on 20 October 2009, at 9am.

[4] The appellant's solicitors then in a letter dated 13 October 2009 to the respondents' solicitors referred to a conversation between them on 9 October 2009 informing them that the appellant would be withdrawing the appeal on the hearing date of 20 October 2009. The appellant's solicitors proposed that there be no order as to costs and the deposit be refunded to the appellant. The respondents' solicitors' reply vide letter dated 19 October 2009 states that they had no objection to the withdrawal of the appeal with no order as to costs and that the deposit be refunded to the appellant.

[5] A day prior to the hearing date of 20 October 2009, the appellant's

solicitors issued two letters. By letter dated 19 October 2009 to the appellant, due to a difference of opinion between themselves as solicitors and the appellant, the appellant was advised to appoint new solicitors and to file a Notice of Change of Solicitors. This letter also stated that they (ie the appellant's solicitors), would not be present in court on the hearing date of the appeal on 20 October 2009.

[6] Vide another letter of the same date, 19 October 2009, to the court, the appellant's solicitors notified the court of their intention to discharge themselves from acting for the appellant on the ground that they were unable to receive instructions from the appellant within time and for the appeal to be adjourned to another date.

[7] The following day, on 20 October 2009, when the appeal was called up for hearing at about 10.15am, the appellant's solicitors/counsel was absent whilst the respondents' counsel was present. On the application of the respondents' counsel the appeal was then struck out by the court.

[8] The reasons advanced by the appellants' counsel why this court should exercise its discretionary power of reinstatement in the appellant's favour was this. The appellant's solicitors/counsel was not present when the appeal was called up for hearing on 20 October 2009 at 10.15am as they were under a misapprehension that the case was fixed for hearing on 20 October 2009 at 11am, not 9am.

[9] We are unable to accept this reason. The notice issued by the registry of the Court of Appeal is clear. The case was fixed for hearing on 20 October 2009 at 9am. This explanation appears to be inconsistent with the appellant's solicitors' own letter dated 19 October 2009 to their client, the appellant, ie by reason of the difference of opinion between them that they will not be present in court on 20 October 2009 and the appellant was to retain new solicitors, and file a notice of change of solicitors. In other words it would appear that the appellant's counsel's non-attendance on 20 October 2009 was intentional and a conscious act, not by reason of a misapprehension as to the exact time when the appeal would be called up for hearing.

[10] On the appellant's counsel's contention that the respondents' counsel should not have applied for the appeal to be struck out by their non-attendance on the appointed hearing date as they had notice of the change of mind that the appellant wished to proceed with the appeal, we are of the following view. The difference of opinion between the appellant's solicitors and their client (the appellant), and the appellant's counsel's intention to discharge themselves as his solicitors did not excuse them from being present in court as notified by the court on the scheduled date and time. Unless and until discharged, or notice of

change of solicitors had been filed, they continue to be on record and are required to be present. Further, even if we were to accept that the respondents' counsel had notice of the change of mind that the appeal would not be withdrawn, it must be stressed that whether a case is to be adjourned or not is not upon agreement of parties but at the discretion of the court. The appellant's solicitors were clearly under a serious misapprehension to expect the hearing of the appeal to be adjourned as a matter of course by the court by reason of having issued the letter which they did to the court a day prior to the hearing date.

[11] By reason of the appellant's solicitors absence when the appeal was called up for hearing, and no adjournment having been granted pursuant to the letter dated 19 October 2009, the Court of Appeal certainly was entitled on the application of the respondents' counsel to strike out the appeal on 20 October 2009.

[12] As the appellant's solicitors had failed to furnish credible reasons for this court to exercise its discretion of reinstatement in the appellant's favour, encl (22a) was dismissed with no order as to costs. By reason of the application for reinstatement of the appeal having been dismissed, the appellant's solicitors' application to discharge themselves as the appellant's solicitors in encl (20a) was rendered academic and redundant and was accordingly struck out.

Enclosure (22a) dismissed with no order as to costs and encl (2a) struck out.

Reported by Mashrifah Ravendran